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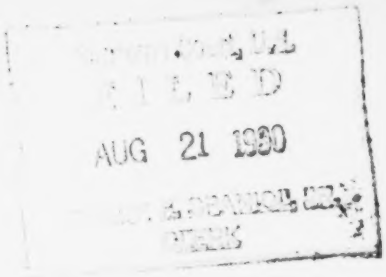

NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

DAVID ROSENBERG, GINA M. DAVIDSON, VICKIE COLLINS, AND PAMELA J. THURMAN,
Petitioners,

vs.

CITY OF LORAIN, OHIO
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of Ohio

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QUESTION PRESENTED FOR REVIEW

Whether the Lorain, Ohio ordinance which prohibits the exposure of specified body parts by performers in any live act, demonstration or exhibition, other than in a theater as narrowly defined, is constitutional on its face and as applied to ordinary, barroom type dance performances.

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NO.

IN THE SUPREME COURT OF THE UNITED STATES
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DAVID ROSENBERG, GINA M. DAVIDSON, VICKIE COLLINS, AND PAMELA J. THURMAN,
Petitioners,

vs.

CITY OF LORAIN, OHIO
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of Ohio

The petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment of the Supreme Court of Ohio entered on May 23, 1990 dismissing the appeal by the petitioners in the case of **City of Lorain v. Gina M. Davidson et al.**, Nos. 89CA004535, 89CA004536, 89CA004537, 89CA004538, 1989 Ohio App. LEXIS 4463.

OPINIONS BELOW

On May 23, 1990, the Supreme Court of Ohio dismissed petitioners' appeal from the decision of the Court of Appeals of Ohio on the basis that the appeal presented "no substantial constitutional question." The Supreme Court of Ohio's dismissal was by docket entry without opinion. The entry is reprinted in the Appendix at A1.

The decision of the Court of Appeals of Ohio, Ninth Appellate District, Lorain, of November 29, 1989, affirming the decision by the Lorain Municipal Court, appears at 1989 Ohio App. LEXIS 4463. The opinion of the Court of Appeals of Ohio is reprinted in the Appendix at A3.

Petitioners were charged with violation of Lorain Municipal Ordinances, Sections 533.21 and 533.22. The

petitioners' motion to dismiss the charges against them on the grounds that the ordinances were unconstitutional on their face and as applied was denied by the Lorain Municipal Court in an opinion that is unreported, but which is reprinted in the Appendix at A21.

JURISDICTION

The judgment to be reviewed was entered on May 23, 1990. No petition to rehear the judgment was filed.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of

religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The statutes subject to this review are Lorain Municipal Ordinances, Sections 533.21 and 533.22, which provide as follows:

533.21 Exposure of Performers in Public Prohibited

No person shall, while participating in any live act, demonstration, or exhibition, in any public place, place open to the public, or place open to public view;

(a) Exposes his or her genitals, pubic hair, buttocks, perineum, anal region, or pubic hair region; or

(b) Exposes any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, perineum, anal region, or pubic hair region; or

(c) Exposes any portion of the female breast at or below the areola thereof;

(d) Commits actual or simulated touching, caressing or fondling on the breasts, buttocks, anus or genitals.

(e) Displays films or pictures depicting acts, a live

performance of which would be prohibited by this section.
(f) Whoever violates this section is guilty of a misdemeanor of the first degree.

533.22 Counseling or Assisting Unlawful Public Exposure Prohibited

(a) No person shall cause, permit, procure, counsel, or assist any person to expose or simulate exposure as prohibited in Section 533.21.
(b) Whoever violates this section is guilty of a misdemeanor of the first degree.

The complete text of Lorain City Ordinance Sections 533.01 - 533.22 is reprinted in the Appendix beginning at A30.

STATEMENT OF THE CASE

Petitioners Davidson, Collins and Thurman were professional dancers who performed at Secrets Night Club in Lorain, Ohio. Petitioner Rosenberg was the manager of Secrets Night Club. On May 28, 1988, Lorain plain clothes

detectives requested admission and were admitted to Secrets, where they observed the petitioners' performance. The petitioners' performance was not found to be obscene. However, their performance did include exposing parts of their bodies, namely their buttocks and breasts, in violation of the Lorain ordinances set out above.

Petitioners, Davidson, Collins, and Thurman, were each charged with one count of violating Section 533.21 of the Lorain City Ordinances, set out above. Petitioner Rosenberg was charged with three counts of violating Section 533.22 of the Lorain City Ordinances, set out above. Each petitioner pled not guilty, and moved to dismiss on the ground that the ordinances were unconstitutional as restricting their rights under the First Amendment to the United States Constitution and the comparable provision

of the Ohio Constitution. The Lorain Municipal Court held the ordinances constitutional, and denied the petitioners' motion to dismiss. The petitioners and the City of Lorain then entered into a stipulation of facts, which is reprinted in the Appendix at A27, and the petitioners then changed their pleas to **nolo contendere**. Petitioners were convicted as charged. Petitioners Davidson, Collins and Thurman were sentenced to a $250 fine, 10 days in jail, with the 10 days in jail suspended, and a 1 year probation. Petitioner Rosenberg was sentenced to a $100 fine and 5 days in jail for each of three counts, with the 15 days in jail suspended and a 1 year probation.

Petitioners then appealed the denial of their motion to dismiss and their convictions to the Ohio Court of Appeals,

where they again challenged the constitutionality of the ordinances on the basis that, on their face and as applied, they violated the First Amendment to the United States Constitution. With one judge dissenting, the Ohio Court of Appeals held the ordinances constitutional and affirmed the convictions.

Petitioners then appealed the decision of the Ohio Court of Appeals to the Supreme Court of Ohio on the same constitutional grounds. On May 23, 1990 the Supreme Court of Ohio dismissed the petitioners' appeal on the ground that it raised no substantial constitutional question.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Ohio Supreme Court's decision, interpreting and applying the First Amendment to the United States Constitution, conflicts with decisions of other state courts and decisions of the United States courts of appeals.

There are many decisions in the state and lower federal courts involving First Amendment challenges to attempts by states or localities to prohibit nude or partially nude dancing. It is apparent from even a cursory examination of the cases that the results and analyses are frequently in conflict.

The most recent cases and the most recent conflict in decisions involve the May 23, 1990 decision of the Supreme Court of Ohio in petitioners case herein, and the May 24, 1990 en banc decision by the United States Court of Appeals for the Seventh Circuit in **Miller v. Civil City of South Bend**, Nos. 88-3006, 88-3244, 1990 U.S. App. LEXIS 8532. In

Miller, the Seventh Circuit held that the Indiana public indecency statute was unconstitutional as applied to nude performance dancing in two cases, one involving an adult bookstore and one a licensed drinking establishment. The losing parties in the **Miller** case have petitioned this Court for review by way of writ of certiorari. **Barnes et al. v. Glen Theatre, Inc., et al.**, No. 90-26. The conflict between **Miller** and the present case can best be resolved by grant of review in both cases.

Neither **Miller** nor the present case involve laws governing the sale of alcoholic liquors, although the establishment involved in the present case and one of those involved in the **Miller** case did serve alcoholic liquors. The Ohio Court of Appeals in the present case deemed the fact that the establishment served alcoholic liquors

sufficient to constitutionally justify the application of the Lorain ordinance to petitioners, even though the ordinance involved was explicitly not limited to places which sold alcoholic liquors and was not an ordinance regulating such sale. The Seventh Circuit held that the presence of liquor was constitutionally irrelevant since the statute involved was not a liquor regulatory ordinance adopted pursuant to the Twenty-first Amendment to the United States Constitution, and was not limited to places that served intoxicating liquors. Thus, the factor that was found to be determinative in such cases as **California v. LaRue**, 409 U.S. 109 (1972) and **New York State Liquor Authority v. Bellanca**, 452 U.S. 714 (1981) is not present in either **Miller** or the present case.

Miller, the present case and the

many cases cited at the end of this section of the petition all involve performances of non obscene dances. The determinative factor in most of these cases has not been the particular facts or the particular ordinance, but rather the extent to which such dancing is expression constitutionally protected by the First Amendment. On this issue the cases are in conflict, as dramatically illustrated by the decisions only one day apart by the Seventh Circuit in **Miller** and by the Supreme Court of Ohio in the present case.

Those courts upholding prohibitions on nude dancing have usually done so on the erroneous basis that such dancing is mere conduct and lacks the elements of communication required for First Amendment protection. **See, e.g., City of Portland v. Derrington**, 253 Or. 289, 451 P.2d 111, **cert. denied**, 396 U.S. 901

(1969); **Major Liquors, Inc. v. City of Omaha**, 188 Neb. 628, 198 N.W. 2d 483 (1972); **State v. Baysinger**, 272 Ind. 236, 397 N.E. 2d 580 (1979), **appeals dismissed sub nom. Clark v. Indiana**, 446 U.S. 931 (1980); **Gabriele v. Town of Old Orchard Beach**, 420 A. 2d 252 (Me. 1980). Similarly, the reasoning of the Ohio Court of Appeals decision that was affirmed by the Ohio Supreme Court in the present case was based on the false notion that the ordinance would not "chill a substantial amount of public nudity engaged in for the purpose of expression..." **City of Lorain v. Gina M. Davidson et al.**, Appendix at A16.

The Federal Courts of Appeals are generally, like the Seventh Circuit in **Miller**, in conflict with these state high court decisions. See, e.g., **BSA Inc. v. King County**, 804 F.2d 1104 (9th Cir.

1986), **Krueger v. City of Pensacola**, 759 F.2d 851 (11th Cir. 1985); **Leverett v. City of Pinellas Park**, 775 F. 2d 1536 (11th Cir. 1985). Some state courts of last resort in factually indistinguishable cases have held such dancing to be constitutionally protected expression. **See, e.g., Morris v. Municipal Court**, 32 Cal. 3d 553, 186 Cal. Rptr. 494, 652 P.2d 51 (1982); **Commonwealth v. Sees**, 374 Mass. 532, 373 N.E. 2d 1151 (1978), **Koppinger v. City of Fairmont**, 311 Minn. 186, 248 N.W.2d 708 (1976).

The decisions of state courts of last resort in Ohio, Indiana, Oregon, Nebraska, and Maine are in direct conflict with the decisions of other state courts of last resort and the decisions of the United States courts of appeals for the Seventh, Ninth and Eleventh Circuits. Expression that is constitutionally protected by decisions in some

circuits and some states is suppressed in other states. Such a conflict of long standing, involving numerous courts, is unhealthy and is a sound basis for the grant of review in the present case.

II. This case presents an important issue of federal law that should be finally settled by this Court.

This Court has been presented with the question of the extent to which dancing of the type involved in this case is protected by the First Amendment, but thus far this Court has not definitively and explicitly given the guidance so obviously needed to avoid the conflicts and repeated litigation of the issue in the state and lower federal courts. Such a state of law can only lead to continual litigation, which is wasteful of the resources of our courts. The uncertainty produced by this state of affairs results in a chilling effect on

constitutionally protected rights of expression. The fact that there are precedents in a number of jurisdictions holding such laws constitutional is an inducement to some states and local legislatures to expend their limited resources to draft and adopt new statutes and ordinances attempting to ban constitutionally protected expression. This in turn has resulted and will continue to result in even more litigation in both state and federal courts challenging these statutes and ordinances.

The decision by the Supreme Court of Ohio is wrong and should be corrected by this Court. The decision by the Seventh Circuit in **Miller** is sound, but without the express affirmance of this Court, which can come only from accepting both cases for review, some state courts will continue to be mislead and will fail to apply properly the principles of the

First Amendment that have long guided this Court.

Performance of dance as an important form of culture and entertainment long predates the First Amendment. Certainly performance dancing is no less expressive than the music in this Court's last term decision in **Ward v. Rock Against Racism**, ___ U.S. ___, 109 S.Ct. 2746 (1989). The dancing involved in the present case may not be high art, but it is because "governmental officials cannot make principled distinctions in this area [that] the Constitution leaves matters of taste and style so largely to the individual." **Cohen v. California**, 403 U.S. 15, 25 (1971). As stated in **Miller**, "[a]ny attempt to distinguish 'high' art from 'low' entertainment based solely on the advancement of intellectual ideas must necessarily fail." Slip op. at 15.

"'Nudity alone' does not place otherwise protected material outside the mantle of the first amendment." **Schad v. Borough of Mount Ephraim**, 452 U.S. 61, 66 (1981). "Sexual expression which is indecent but not obscene is protected by the First Amendment." **Sable Communications v. FCC**, ___ U.S. ___, 109 S. Ct. 2829, 2836 (1989). "When the government, acting as censor, undertakes selectively to shield the public from some kinds of [expression] on the grounds that they are more offensive than others, the First Amendment strictly limits its power." **Erznoznik v. City of Jacksonville**, 422 U.S. 205, 209 (1975).

When presented with the opportunity, this Court has strongly and consistently indicated that dancing of the sort involved in this case is entitled to First Amendment protection. **Schad v. Borough of Mount Ephraim**, 452 U.S. 61

(1981), perhaps most strongly supports the result in **Miller** and is inconsistent with the result in the present case. This Court, as early as **LaRue** and **Doran v. Salem Inn, Inc.**, 422 U.S. 922 (1975), has recognized that "some of the performances to which these regulations address themselves are within the limits of constitutional protection of freedom of expression..." **LaRue**, 409 U.S. at 118. However, as Justice Stevens urged in his dissent in **Bellanca** at 723, and Justices White and Brennan urged in dissenting to the denial of certiorari in **Young v. Arkansas**, 474 U.S. 1070, 1072 (1986), it is time for this Court to bring the issue to an end and make a definitive determination of the scope of the First Amendment as applied to this popular dance form.

While the First Amendment is not

absolute and some regulation of performance dancing might be constitutional, what Lorain has attempted to do here fits none of accepted justifications for laws which restrict protected expression.

The petitioners' dances were not found obscene. This is not a time, place and manner restriction - the ordinance totally bans performances of any "live act, demonstration, or exhibition, in any public place, place open to the public, or place open to public view". Lorain Ordinance Section 533.21. Appendix at A39. The only exception is for "a theater which is primarily devoted to theatrical performances." Lorain ordinance Section 533.23. Appendix at A41. This theatrical exception would not apply to the establishment involved in this case, those involved in **Miller**, **Schad**, **Doran**, or indeed to those involved in any of the

cases cited in this Petition.

This is not a law regulating or relating to intoxicating liquors, or a law adopted pursuant to the Twenty-First Amendment to the United States Constitution. Whether the establishment involved happens to serve or be licensed to serve intoxicating liquors is no more relevant here than it was in **Doran, Miller, Krueger,** or **Leverett.** As in **Miller**, this case involves merely an attempt to prohibit nude dancing because the community finds it "distasteful and/or morally repugnant." Slip op. at 17. To jump from **LaRue** to the conclusion reached by the Ohio Court of Appeals turns alcohol into a kind of speech suppressant, and is completely without precedent in Supreme Court jurisprudence.

III. This case is an appropriate vehicle for deciding the issues presented.

There are no factual questions at issue in this case to obscure the important constitutional issues. The interests of the parties are real and compelling. If review is not granted in this case the petitioners will be faced with criminal penalties and will carry a criminal record, and their right to constitutionally protected expression in the future will be threatened by future prosecutions under the same ordinances.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

THE SUPREME COURT OF OHIO

1990 TERM

To wit: May 23, 1990

City of Lorain, Appellee, : Case No. 90-118

v. : E N T R Y

Gina M. Davidson et al., Appellants. :

Upon consideration of the motion for an order directing the Court of Appeals for Lorain County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by American

Civil Liberties Union.

(Court of Appeals Nos. 89CA004535, 89CA004536, 89CA004537 and 89CA004538.)

THOMAS J. MOYER,
Chief Justice

STATE OF OHIO	)	IN THE COURT OF
	)	APPEALS
COUNTY OF LORAIN	)	ss:
	)	NINTH JUDICIAL
	)	DISTRICT
	)	

CITY OF LORAIN	)	C.A. Nos. 89CA004535
	)	89CA004536
Plaintiff-Appellee	)	89CA004537
	)	89CA004538
v.	)	
	)	APPEAL FROM JUDGMENT
GINA M. DAVIDSON	)	ENTERED IN THE
PAMELA J. THURMAN	)	MUNICIPAL COURT OF
VICKIE JANE COLLINS	)	THE COUNTY OF
DAVID ROSENBERG	)	LORAIN, OHIO
	)	CASE NO. 88 CRB 1290

DECISION AND JOURNAL ENTRY

Dated: November 29, 1989

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

QUILLIN, J. Defendants-appellants appeal their convictions under a City of Lorain ordinance prohibiting nude dancing

in the City of Lorain ("Lorain"). We affirm.

On May 28, 1988, two plain clothes police officers entered Secrets Night Club in Lorain, Ohio. While inside, the police officers observed Pamela Thurman dancing in the center of the club. Thurman's clothing consisted of a bikini top and a "T-Bar". Thurman's buttocks were completely exposed and a three inch strip of cloth covered her anal region. Thurman also exposed her breasts completely by pulling her bikini top apart. Two other dancers, Gina Davidson and Vicki Collins, were observed dancing in similar outfits. The officers also observed Davidson expose her breasts completely by separating her bikini top. After conferring with the Lorain City Prosecutor, the officers charged Thurman, Davidson and Collins with violations of Lorain Codified Ordinance Section 533.21.

David Rosenberg, the club manager, was charged with violating Lorain Codified Ordinance Section 533.22. Section 533.21 provides:

> "No person shall, while participating in any live act, demonstration, or exhibition, in any public place, place open to the public, or place open to public view;
>
> "(a) Exposes his or her genitals, pubic hair, buttocks, perineum, anal region, or pubic hair region; or
>
> "(b) Exposes any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, perineum, anal region, or pubic hair region; or
>
> "(c) Exposes any portion of the female breast at or below the areola thereof;
>
> "(d) Commits actual or simulated touching caressing or fondling on the breasts, buttocks, anus or genitals.
>
> "(e) Displays films or pictures depicting acts, a live performance of which would be prohibited by this section.
>
> "(f) Whoever violates this section is guilty of a misdemeanor of the first degree."

Section 533.22 provides:

"***.

"(a) No person shall cause, permit, procure, counsel, or assist any person to expose or simulate exposure as prohibited in Section 533.21.

"(b) Whoever violates this section is guilty of a misdemeanor of this first degree."

Section 533.23 specifically exempts a theater which is primarily devoted to theatrical performances from enforcement of the ordinance. Section 533.01(0) defines "theater" as:

"*** a building, play house, room, hall or other place having a permanent parcel stage upon which movable scenery and theatrical or vaudeville or similar performances are given and seats so arranged that a body of spectators can have an unobstructed view of the stage."

"Public place" is defined by Section 533.01(N) as:

"... a place to which the public or a substantial group of persons has access, and includes, but it is not limited to, highways, transportation facilities, schools, places of amusement, parks playgrounds and hallways, lobbies and other portions of apartment houses and hotels not constitut-

ing rooms or apartments designed for actual residence."

The defendants pleaded not guilty to these charges, and filed motions to dismiss claiming that the Lorain ordinances were unconstitutional.

The trial court denied these motions. The defendants then changed their pleas to nolo contendre. The trial court found the defendants guilty and sentenced them.

ASSIGNMENT OF ERROR

> "The Lorain Municipal Court erred in denying the defendants' motion to dismiss, on grounds of unconstitutionality, the charges against and in adjudging the defendants Gina M. Davidson, Vickie Collins, and Pamela J. Thurman guilty of violating Section 533.21 of the Lorain City Ordinances and in adjudging defendant David Rosenberg guilty of violating Section 533.22 of the Lorain City Ordinances."

It is a long-established principle that courts must presume the constitutionality of legislative enactments. Illinois v. Krull (1987), 480 U.S. 340,

351; Rocky River v. State Emp. Relations Bd. (1989), 43 Ohio St. 3d 1, 10. In construing legislation, the courts are bound to avoid an unconstitutional construction if reasonably possible to do so. United Air Lines v. Porterfield (1971), 28 Ohio St. 2d 97, 100. The presumption can only be overcome by proof beyond a reasonable doubt that the legislation and the Constitution are clearly incompatible. Rocky River, supra; State, ex rel. Dickman v. Defenbacher (1955), 164 Ohio St. 142, paragraph one of the syllabus.

We must first determine if the Lorain ordinances were constitutionally applied to the defendants. The record establishes that Davidson, Collins and Thurman engaged in public nude performance on the premises of an establishment which serves intoxicating liquors, and

that Rosenberg counseled and assisted Davidson, Collins and Thurman to engage in such public nude performance. The Twenty-first Amendment to the United States Constitution grants broad powers to the States to regulate the sale of liquor, and this power outweighs any First Amendment interest in nude dancing. Therefore, the state may ban nude dancing in establishments which serve intoxicating liquors. California v. LaRue (1972), 409 U.S. 109, 118; Doran v. Salem Inn, Inc. (1975), 422 U.S. 922, 932-33.

In the case sub judice, the Lorain ordinances were constitutionally applied to the defendants. Lorain can validly prohibit nude dancing in establishments where liquor is served.

Defendants also claim that the Lorain ordinances are overbroad on their face, and as result, unconstitutional. Because the Lorain ordinances were con-

stitutionally applied to defendants, we must determine whether the defendants have sufficient standing to challenge the ordinances as overbroad.

The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court. New York v. Ferber (1982), 458 U.S. 747, 767; Broadrick v. Oklahoma (1973), 413 U.S. 601, 610.

"*** A closely related principle is that constitutional rights are personal and may not be asserted vicariously. *** These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity

of the Nation's laws.***." Id. at 610-11.

An exception has been carved out of this general rule for challenges claiming that legislation is overbroad on its face and as a result, violates the First Amendment. Ferber, supra, at 768; Broadrick, supra, at 611-12; Dombrowski v. Pfister (1965), 380 U.S. 479, 486; Doran, supra, at 933; Schad v. Mt. Ephraim (1981), 452 U.S. 61, 66; Young v. American Mini Theaters, Inc. (1976), 427 U.S. 50, 59-60. The First Amendment overbreadth doctrine is predicated on the sensitive nature of protected expression: "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." Ferber, supra at 768-69; Gooding v. Wilson (1972), 405 U.S. 518, 521. It

is for this reason First Amendment attacks on overly broad statutes are allowed even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity. Ferber, surpa, at 769; Dombrowski, supra; Gooding, supra.

The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of the statute is truly warranted. Ferber, supra. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, the First Amendment overbreadth doctrine is "strong medicine" and will be employed with hesitation, and then "only as a last

resort." Ferber, supra; Broadrick, supra at 613. Consequently, the First Amendment overbreadth doctrine will be applied, and the litigant can assert the rights of third parties, only if the deterent effect on legitimate expression is both real and substantial, and the legislation is not readily subject to a constitutionally valid limiting interpretation by the court. Young, supra, at 60; Broadrick, supra, at 612; Erznoznik v. City of Jacksonville (1975), 422 U.S. 205, 216; Bigelow v. Virginia (1975) 421 U.S. 809, 816-17. This limitation on the First Amendment overbreadth doctrine is particularly applicable where conduct and not merely speech is involved. Ferber, supra, at 770; Broadrick, supra, at 615.

In determining whether the deterent effect on valid expression is substantial, it is clear that the mere fact that one can conceive of some impermissable

applications of legislation is not sufficient to render it susceptible to an overbreadth challenge. City Council of the City of Los Angeles v. Taxpapers For Vincent (1984), 466 U.S. 789, 800. However, where the legislation unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreath attack. Id., fn. 19; see Erznoznik, supra at 217.

In the case sub judice, we hold that the defendants lack standing to assert the right of third parties to challenge the Lorain ordinances. The possibility that the Lorain ordinances will chill protected expression is, at best, minimal. Neither the United States Supreme Court nor any court in the State of Ohio has determined that public nudity is

unquestionably protected expression under the First Amendment or the Ohio Constitution. See New York State Liquor Auth. v. Bellanca (1981), 452 U.S. 714, 716, citing Doran, supra, at 933.

In Doran, the court limited its holding to a determination that the district court did not abuse its discretion in granting a preliminary injunction against enforcement of an ordinance prohibiting nude dancing in "any public place." Id. at 934; Bellanca, supra. The Supreme Court has never reached the merits of whether or not nude dancing is protected expression per se outside of theaters and establishments which serve intoxicating liquors.

We conclude that even if the nude dancing may be constitutionally protected expression in certain situations, the potential chilling effect on such expression is remote under the Lorain ordi-

nances. The Lorain ordinances specifically exempt theaters from enforcment. Other than nudity in a theatrical production with possible artistic or political merit, which might be constitutionally protected, we have been directed to no other type of public nudity which may be protected expression, and which may be chilled by the Lorain ordinances. Public nudity, be it for the purpose of expression or only mere conduct, in public forums other than "barrooms" and "theaters", is rare at best. The effect of the Lorain ordinances will not chill a substantial amount of public nudity engaged in for the purpose of expression nor will the ordinances chill a substantial amount of public nudity which is only mere conduct. There is less a vital interest in the uninhibited exhibition of material that is on the borderline be-

tween pornography and artistic expression than in the free dissemination of ideas of social and political significance. Young, supra, at 61. Therefore, we hold that the First Amendment overbreadth doctrine is not applicable, and the defendants cannot assert the supposed rights of third persons to challenge the facial validity of the Lorain ordinances.

We adopt the language of the United States Supreme Court by saying:

> "[i]t is our view that [the ordinance] is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." Broadrick, supra, 615- 16.

The judgment of the trial court is affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the

Lorain Municipal Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk or the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

DANIEL B. QUILLIN
FOR THE COURT

CACIOPPO, P.J.
CONCURS

BAIRD, J.
DISSENTS SAYING

It seems clear that dancing is a form of expression entitled to constitutional protection, and nudity alone does not cast otherwise protected material

outside the mantle of the First Amendment. Schad v. Mount Ephraim (1981), 452 U.S. 61, 66. Nudity, without more, is protected expression. New York v. Ferber (1982) 458 U.S. 747, 765, fn. 18. Some of the obvious constitutional problems which arise upon any governmental curtailment of such protected expression are obviated when such curtailment is enacted as part of the state's regulatory scheme concerning the dispensing of alcoholic beverages.

In the upholding a New York Statute, the United States Supreme Court said this about the state legislature:

> "Pursuant to its power to regulate the sale of liquor within its boundaries, it has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs."

New York State Liquor Auth. v.

Bellanca (1981), 452 U.S. 714, 717.

Even if we were to assume that the establishment in question in this case was one in which alcoholic beverages are sold, the City of Lorain has no power to ban or otherwise restrict such sale. The narrowing process engaged in by the majority effectively limits the applicability of the ordinance to an area in which the City of Lorain has no authority.

For this reason, and on the authority of Doran v. Salem Inn, Inc. (1975), 422 U.S. 922, I believe this court must reverse the convictions based upon the constitutional invalidity of the ordinance.

APPEARANCES:

Mark J. Mihok, Asst. Prosecutor, 100 West-Erie Ave., Lorain, Ohio 44052, for plaintiff.

Spencer Neth, Attorney at Law, A.C.L.U., 11075 East Boulevard, Cleveland, Ohio 44106, for Defendants.

COUNTY OF LORAIN

STATE OF OHIO

CITY OF LORAIN	)	Case Nos. 88CRB1290;
	)	88CRB1291;
Plaintiff	)	88CRB1292;
	)	88CRB1293
vs	)	
	)	JOURNAL ENTRY
GINA DAVIDSON	)	
PAMELA J. THURMAN	)	
VICKIE JANE COLLINS	)	
and	)	
DAVID ROSENBERG	)	
Defendants	)	

The question presently before the Court is whether a Motion to Dismiss on the grounds that the City Ordinance is a violation of the Defendants' rights under the 1st and 14th Amendments to the Constitution of the United States should be granted.

Defendants, DAVIDSON, THURMAN and COLLINS are charged with violation of Lorain, Ohio City Ordinance Section 533.21 a, c, & d, entitled "Exposure of

Performers in Public Prohibited". Defendant, ROSENBERG, is charged with violation of Lorain City Ordinance Section 533.22, entitled, "Counseling or Assisting Unlawful Public Exposure Prohibited."

Defendant ROSENBERG is the owner or manager of Secrets Night Club in the City of Lorain, and Defendants, DAVIDSON, COLLINS and THURMAN engaged in nude dancing and related activities, prohibited under Section 533.21.

Lorain City Council after receiving in-put from the community drafted legislation known as Lorain City Ordinance 533.01 et sec.

That portion which is under consideration today as being in violation of the first amendment to the Constitution of the United States follows:

Ordinance 533.21 Exposure of Performers in Public Prohibited

No persons shall, while participating in any live act, demonstration, or exhibition, in any public place, place open to the public, or place open to public view.

a) Exposes his or her genitals, pubic hair, buttocks, perineum, anal region, or pubic hair region; or

c) Exposes any portion of the female breast at or below the areola thereof;

d) Commits actual or simulated touching, caressing or fondling on the breasts, buttocks, anus or genitals.

This section was submitted to voters on referendum on November 5, 1985 and passed by a majority vote.

The impact of the City Ordinance and the referendum is an endeavor by the citizens of Lorain to establish community standards.

Lorain, Ohio is a residential and industrial community located on Lake Erie approximately 30 miles from Cleveland, Ohio. Within the county, and in close proximity to Lorain is a Community College and Oberlin College.

Lorain is called an International City and its population of approximately 75,000 includes people from 52 countries. It is a community with one synagogue and many different churches.

The Motion to dismiss filed by Michael J. Duff, attorney for the Defendants, states the City Ordinance is unconstitutional on its face in that it violates the Defendants' right under the First and Fourteenth Amendment.

In response to this Motion, the Court calls to mind that under section 1.47 of the Ohio Revised Code a statute is presumed that it is in compliance with the Constitutions of the States and of the United States. The freedoms guaranteed under the Constitution of the states and the United States are not absolute. We do not live in an anarchy.

It should also be called to mind

that the Constitution of Ohio which provides for referendum does not prohibit a vote of the people on matters of nudity.

Referendum is a political device for the purpose of enabling the people to enact laws and adopt constitutional amendments by their own direct actions. The people may also use this device to veto legislation.

In its research the Court came upon many cases where the City has the right to zone land for various uses and restrict the sale of alcohol in certain areas by legislative acts as well as referendum.

The Defendants are not restricted from dancing in the nude at private functions or at private parties. The Defendants are not permitted to dance at "Secrets", a night club open to the public.

Motion to Dismiss is denied.

V. PAUL TIMKO, JUDGE

JOINT EXHIBIT A

STIPULATED FACTS

On Saturday, May 28, 1988 at approximately 12:00 o'clock midnight, Lorain police plain clothes detectives Perichak and Taliano, entered the Secrets Night Club at 651 Broadway, Lorain, Ohio.

The detectives entered the club via the second floor west entrance. Admittance is gained through a "buzzer system" at that entrance. David Rosenberg (age 40), later identified as the manager of the club, collected a $2.00 cover charge and permitted admittance to the officers.

The officers while seated at the north end of the bar, observed the following:

A female dancer, later identified as Pamela Thurman (age 23) danced in the center section of the club which is surrounded by tables and chairs occupied by the patrons of the club. Thurman's

clothing consisted of the following: A bikini-like top and a "T - Bar". Thurman's buttocks were completely exposed and a three inch strip of cloth covered her anal region. Thurman was also observed to expose her breasts completely by pulling her "bikini like" top apart briefly, exposing her "areolae".

A second female dancer, indentified as Gina Davidson (age 18), performed in an outfit similar to Thurman's. Davidson exposed her breasts completely by separating her "bikini-like" top, exposing her "areolae."

A third female dance, identified as Vicki Collins, was observed dancing in a similar outfit of a "bikini-like" top and a "T-bar".

The Officers summoned the manager, Rosenberg, and informed him of their

observations. The four were later charged after conferring with the Lorain City Prosecutor's Office.

Pamela Thurman	Mark J. Mihok, Asst. Pros.
Gina Davidson	Atty. Michael Duff
Vicki Collins	
David Rosenberg	

AN ORDINANCE

TO BE SUBMITTED TO THE ELECTORS OF THE CITY OF LORAIN, OHIO, FOR THEIR APPROVAL OR REJECTION AT THE NEXT REGULAR GENERAL ELECTION TO BE HELD ON NOVEMBER 5, 1985.

AN ORDINANCE AMENDING CHAPTER 533 OF THE CODIFIED ORDINANCES OF THE CITY OF LORAIN, PROHIBITING THE DISSEMINATION OF HARMFUL MATERIALS TO JUVENILES, PROHIBITING THE POSSESSION AND SALE OF CHILD PORNOGRAPHICAL MATERIALS, AND PROHIBITING NUDE DANCING.

533.01 Definitions

533.01(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, image, description, motion picture film, video tape, phonographic record, or tape, or other

tangible thing capable of arousing interest through sight, sound, or touch.

533.01(L) "Knowledge of character" means having general knowledge, or reason to know; or a belief or ground for belief which warrants further inspection or inquiry, of the nature and character of the material or performance involved. A person has such knowledge when he or she knows or is aware that the material or performance contains, depicts, or describes sexually explicit nudity, sexual activity, sadomasochistic sexual abuse, or lewd exhibition of the genitals, whichever is applicable, whether or not such person has precise knowledge of the specific contents thereof. Such knowledge may be proven by direct or circumstantial evidence, or both.

533.01(M) "Person" means any individual, corporation, company, busi-

ness, partnership, association, establishment, or other legal entity of any kind.

533.01(N) Public Place

"Public Place" means a place to which the public or a substantial group of persons has access, and includes, but it is not limited to, highways, transportation facilities, schools, places of amusement, parks, playgrounds and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.

533.01(O) Theater

Theater means a building, play house, room, hall or other place having a permanent parcel stage upon which movable scenery and theatrical or vaudeville or similar performances are given and seats so arranged that a body of spectators can have an unobstructed view of the stage.

533.14 Prohibition of Child Pornography

(a) No person with knowledge of the character of material, shall do any of the following:

(1) Possess or control any obscene material that has a minor as one of the participants.

(2) Possess or control any material that shows a minor participating or engaging in sexual activity, masturbation or bestiality.

(3) Possess or control any nudity oriented matter that shows a minor who is not the person's child or ward, unless one of the following applies:

(i) The material is possessed for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper

purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

533.15 Furnishing Material Harmful to Juveniles

(a) No person, with knowledge of its character, shall recklessly furnish or present to a juvenile any material or performance which is harmful to juveniles.

(b) The following are affirmative defenses to a charge under this section, involving material or a performance which is harmful to juveniles but not obscene:

(1) The defendant is the parent, guardian, or spouse of the

juvenile involved.

(2) The juvenile involved, at the time the material or performance was presented to him was accompanied by his parent or guardian who, with knowledge of its character, consented to the material or performance being furnished or presented to the juvenile.

(3) The juvenile exhibited to the defendant or his agent or employee a draft card, driver's license, birth certificate, marriage license, or other official or apparently official document purporting to show that such juvenile was eighteen years of age or over, or married, and the person to whom such document was exhibited did not otherwise have reasonable cause to believe that such juvenile was under

the age of eighteen and unmarried.

(c) Whoever violates this section is guilty of furnishing material harmful to juveniles, a misdemeanor of the first degree.

533.16 It is an affirmative defense to a charge under this section, involving material or a performance which is obscene or harmful to juveniles, that such material or performance was furnished or presented for a bona fide medical, scientific, educational, governmental, judicial, or other proper purpose, by a physician, psychologist, sociologist, scientist, teacher, librarian, clergyman, prosecutor, judge, or other proper person.

533.17 Unlawful Display of Materials Harmful to Juveniles

(a) No person, having control or supervision of any business or commercial establishment or premises, with knowledge

of its character of the material involved, shall:

(1) Exhibit or display for sale any material which is harmful to juveniles unless the material is exhibited or displayed in a portion of the business premises which is inaccessible to juveniles or unless the material is exhibited or displayed in a manner which prohibits examination or observation by juveniles.

(b) Whoever violates this section is guilty of furnishing material harmful to juveniles, a misdemeanor of the first degree.

533.18 Unlawful exposure by Waiters, Waitresses, and Entertainers

No person who, while acting as a waiter, waitress or entertainer, in an establishment which serves food, bever-

ages, or food and beverages, including but not limited to alcoholic beverages, for consumption on the premises of the establishment:

(a) Expose his or her genitals, pubic hair, buttocks, perineum, anal region or pubic hair region; or

(b) Expose any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, perineum, anal region or pubic hair region; or

(c) Exposes any portion of the female breast at or below the areola thereof.

(d) Whoever violates this section is guilty of a misdemeanor of the first degree.

533.19 Counseling or Assisting Unlawful Exposure Prohibited

(a) No person shall cause, permit, procure, counsel, or assist any

person to expose or simulate exposure as prohibited in Section 533.18.

(b) Whoever violates this section is guilty of a misdemeanor of the first degree.

533.20 Employment or Payment Not Necessary for Offense

A person shall be deemed to be a waiter, waitress or entertainer if such person acts in that capacity without regard to whether or not such person is paid any compensation by the management of the establishment in which the activity is performed.

533.21 Exposure of Performers in Public Prohibited

No person shall, while participating in any live act, demonstration, or exhibition, in any public place, place open to the public, or place open to public

view;

(a) Exposes his or her genitals, pubic hair, buttocks, perineum, anal region, or pubic hair region; or

(b) Exposes any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, perineum, anal region, or pubic hair region; or

(c) Exposes any portion of the female breast at or below the areola thereof;

(d) Commits actual or simulated touching, caressing or fondling on the breasts, buttocks, anus or genitals.

(e) Displays films or pictures depicting acts, a live performance of which would be prohibited by this section.

(f) Whoever violates this section is guilty of a misdemeanor of the first

degree.

533.22 Counseling or Assisting Unlawful Public Exposure Prohibited

(a) No person shall cause, permit, procure, counsel, or assist any person to expose or simulate exposure as prohibited in Section 533.21.

(b) Whoever violates this section is guilty of a misdemeanor of the first degree.

533.23 Exemption of Theatrical Establishments

The provisions of Sections 533.21, shall not apply to a theater, which is primarily devoted to theatrical performances.

VERIFICATION

The Committee of Petitioners, consisting of Rev. Linwood H. Chamberlain,

Jr., Donna Garwell, and Robert E. Vansant, jointly and severally, do hereby swear, aver and verify that this verified ordinance is a true and exact copy of the proposed initiated ordinance which will be set forth in full in the initiative part petitions to be circulated for signatures of electors of the City of Lorain, Ohio, for placement of this verified ordinance upon the ballot at the next regular general election to be held on November 5, 1985.

COMMITTEE OF PETITIONERS:

_____

Rev. Linwood H. Chamberlain, Jr.

_____

Donna Garwell

_____

Robert E. Vansant

(2)

No. 90-341

Supreme Court, U.S.
FILED
SEP 19
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

DAVID ROSENBERG, GINA M. DAVIDSON, VICKIE COLLINS and PAMELA J. THURMAN,
Petitioners,

vs.

CITY OF LORAIN, OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 90-341

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TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent, City of Lorain, concurs with petitioners' Statement of the Case in their petition for writ of certiorari, but takes exception to their description of the female defendants-petitioners on page 6 as "professional" dancers.

SUMMARY OF ARGUMENT

This Court has consistently held that states and municipalities have the power to regulate barroom nude dancing pursuant to the Twenty-First Amendment to the United States Constitution.

The Lorain Ordinance properly regulates such nude dancing and does not chill protected expression.

REASONS FOR DENYING THE WRIT

A. The Lorain Ordinance properly regulates public nudity.

Legislative acts are, or course, presumed valid and constitutional. *Illinois v. Krull*, 480 U.S. 340 (1987); *Benjamin v. City of Columbus*, 104 Ohio App. 293 (Franklin 1957), *affirmed*, 167 Ohio St. 103 (1957).

Unlike the state statutes and municipal ordinances contested in other cases, the Lorain Ordinance is narrowly and specifically drawn. Petitioners state that the recent Seventh Circuit decision in *Miller v. Civil City of South Bend*, 904 F.2d, 1081 (1990), is factually indistinguishable and in direct conflict with the Ohio Supreme Court decision below.

In actuality, the statute construed in *Miller* is quite different from the Lorain Ordinance. The Indiana public indecency statute prohibits, *inter alia*, nudity in a public place. The Lorain Ordinance is not nearly so broad in its application.

First, the Lorain Ordinance excepts "theaters" as defined by the Ordinance from its prohibition against unlawful exposure. Also, the section under which petitioners were charged applies only to persons, ". . . . participating in any live act, demonstration, or exhibition. . . .", Lorain Ord. Sec. 533.21.

Therefore, the language of the Lorain Ordinance avoids two major problems present in other broader statutes. The "theater" exception would not prohibit mere nudity in a play, opera, musical or similar setting. In addition, the fact that the ordinance applies only to those involved in a live act, performance or exhibition, abrogates the possibility of prosecution of innocuous

nudity in, for example, a high school locker room. Therefore, the Lorain Ordinance allows free and full expression without the fear of overbroad application. It is a valid time, place and manner regulation.

The Ohio Court of Appeals accurately stated, "[t]he possibility that the Lorain Ordinance will chill protected expressions is, at best minimal . . . ." *City of Lorain v. Gina M. Davidson, et al.*, Pet. App. at A14.

B. Certiorari is Inappropriate Since the Ohio Supreme Court's Decision is in Full Accord With Holdings of this Court.

Petitioners argue that there is widespread conflict between and among state and federal courts concerning the prohibition or regulation of nude dancing.

Petitioners cite several state court decisions which purportedly hold that nude dancing may be prohibited because it is mere conduct and lacks expressive content sufficient to be afforded First Amendment protection; *City of Portland v. Derrington*, 253 Or. 289, 451 P.2d 111, *cert. denied*, 396 U.S. 901 (1969); *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483 (1972); *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980); *Gabriele v. Town of Old Orchard Beach*, 420 A.2d 252 (Me. 1980). However, each of the above decisions is at least ten years old and have certainly been modified by subsequent decisions of this Court.

Petitioners indicate that the decision of the Ohio Court of Appeals below, which was affirmed by the Ohio Supreme Court, followed the above-cited cases. Neither Ohio decision cited any of these cases nor did the Ohio courts hold that nude dancing was mere conduct. In fact,

the Ohio Court of Appeals strongly implied that nude dancing is afforded some measure of First Amendment protection, consistent with holdings in this court. *City of Lorain v. Gina M. Davidson, et al.,* Pet. App. at A9.

The Ohio Supreme Court decision does not conflict with recent decisions of this Court or the various circuits. The Twenty-First Amendment to the United States Constitution grants broad powers to the State of Ohio and its municipalities to regulate liquor-related activities. This Court has determined that such powers outweigh First Amendment interests in nude dancing. *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 933 (1975); *California v. LaRue,* 409 U.S. 109, 118 (1972). The Ohio Supreme Court correctly decided that the Lorain ordinances were constitutionally applied to the defendants, because their activity took place within a liquor establishment.

Petitioners' statement that decisions of this Court, federal circuit courts and state courts are in conflict is erroneous. The *Miller* cases cited by petitioners does not recognize such conflicts. In fact the Court states, ".... the Supreme Court, along with several circuit and district courts, has repeatedly and consistently intimated that nude dancing performed as entertainment is protected activity under the First Amendment...." *Miller, supra* at 1082.

On this basis, the Ohio Supreme Court is not in conflict with the Seventh Circuit, nor is it in conflict with prior holdings of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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